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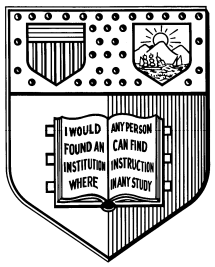

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FROM "MISSION-CREEP" TO GESTALT-SWITCH: JUSTICE, FINANCE, THE IFIS, AND GLOBALIZATION'S INTENDED BENEFICIARIES

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I. INTRODUCTION: REVISITING AND RE-ENVISAGING, RATHER THAN REVISING, THE MANDATES OF THE IFIS

"Globalization"—that is, transnational economic integration—and its principal instrumentalities—the Bretton Woods institutions in particular, and also other organizations, treaty *régimes* and cognate arrangements within the bounds of whose variously "hard" and "soft" prescriptions financial and productive activity proceed—have aroused unprecedented passions in the past ten years. Critics from the "left" complain that the agents of globalization transfer

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wealth or the makings of well-being from the vulnerable poor to the already rich, while transferring risk in the opposite direction, and that they do so by means that show disregard for sovereign prerogatives, for their own, more limited mandates, for democratic values and for justice.[1] Critics from the "right" complain that many of the same agents, the international financial institutions (IFIs)[2] in particular, transfer wealth or the makings of well-being from the productively virtuous, the competent, and the prudent to the corrupt, the profligate, and the inept, and that they do so by means that show disregard for sovereign prerogatives, for their own, more limited mandates, and, sometimes, for democratic values and for justice.[3] Globalization's agents, particularly the IFIs, surely must be

1. *See, e.g.*, JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002) (generally addressing the pitfalls of globalization); CHERYL PAYER, THE WORLD BANK: A CRITICAL ANALYSIS (1982) (devoting attention to particular economic sectors in criticizing World Bank lending policies); Jason Morgan-Foster, *The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited*, 24 MICH. J. INT'L L. 577 (2003) (examining the possibility that structural adjustment programs conflict with economic, social, and cultural rights); Joseph E. Stiglitz, *Failure of the Fund: Rethinking the IMF Response*, HARV. INT'L REV., Summer 2001, at 14, 14 (arguing that the IMF's loan conditions, including contractionary monetary and fiscal policies, contribute to economic instability); Michael Massing, *From Protest to Program*, AM. PROSPECT, Summer 2001, at 2, 2; Martin Wolf, *Will the Nation-State Survive Globalization?*, FOREIGN AFF., Jan./Feb. 2001, at 178, 184–85; Richard Falk & Andrew Strauss, *Toward Global Parliament*, FOREIGN AFF. Jan./Feb. 2001, at 212, 215; David Moberg, *How to Fix the IMF: First, Do No Harm*, IN THESE TIMES, May 15, 2000, at 9; Timothy A. Canova, *Global Finance and the International Monetary Fund's Neoliberal Agenda: The Threat to Employment, Ethnic Identity, and Cultural Pluralism of Latina/o Communities*, 33 U.C. DAVIS L. REV. 1547 (2000) (critiquing the IMF from the perspective of Latino/a communities); Graham Bird, *Reforming the IMF: Should the Fund Abandon Conditionality?*, 7 NEW ECON. 214 (2000) (discussing the loss of national sovereignty accompanying conditional IMF loans); Mary C. Tsai, *Globalization and Conditionality: Two Sides of the Sovereignty Coin*, 31 LAW & POL'Y INT'L BUS. 1317 (2000) (examining the "implications of globalization and [IMF loan] conditionality on state sovereignty through the prism of the Asian financial crisis"); Saladin Al-Jurf, *Good Governance and Transparency: Their Impact on Development*, 9 TRANSNAT'L & CONTEMP. PROBS. 193, 206–08 (1999); Alan Beattie, *Raw Deal for Poor Nations Limits Backing for Free Trade: A Report by Oxfam Sounds a Critical Note on Liberalization Gains That are Skewed Towards Rich Countries*, FIN. TIMES, Apr. 12, 2002, at P3.

2. For those unfamiliar with the term, "IFIs" has become the standard abbreviation for "international financial institutions"—the IMF, the International Bank for Reconstruction and Development (IBRD or World Bank), and other multilateral development banks (MDBs).

3. *See, e.g.*, DAVID F. DEROSA, IN DEFENSE OF FREE CAPITAL MARKETS: THE CASE AGAINST A NEW INTERNATIONAL FINANCIAL ARCHITECTURE (2001) (undertaking a pure defense of the free market and rejecting additional regulation in the sphere of global finance); PATRICIA ADAMS, THE WORLD BANK'S FINANCES: AN INTERNATIONAL S&L CRISIS (Cato Policy Analysis No. 215, 1994); The IMF and International Economic Policy, Hearing Before the Joint Economic Committee, 105th Cong. (statement of Allan H. Meltzer, Political Economy Professor, Carnegie Mellon University); Martin S. Feldstein, *Refocusing the IMF*, 77 FOREIGN AFF., Mar./Apr. 1998, at 20, 20 (arguing that the IMF should limit its role to providing technical advice and financial assistance); Nicholas Eberstadt & Clifford M.

doing something right, to have made so many enemies (on both sides of the traditional political divide).

But globalization's true promise, true freedom for all—freedom from material want and freedom from unwarranted subordination or violence; freedom to pursue a life worth living, with others, as a moral equal among equals—remains unredeemed. And insofar as it does, globalization's agents may legitimately be adjudged not yet to have done *enough* that is right. Making enemies on all sides can plausibly be taken for an indicator of integrity. Making *friends* of all would be a sign of blessing.

This Essay suggests some means by which the IFIs, and more generally, globalization as a whole, might become the blessings they were meant to be—means by which their promises might be redeemed. These means will not, at least not necessarily, require changes to the IFIs' or other institutions' fundamental structures. Nor will these means require that the institutions' mandates, their "missions," be radically altered. Rather, this Essay suggests that a simple shift of focal point—a "gestalt-switch"—from one to another of those objects jointly constituting the constellations of the IFIs' traditional concerns will do the trick. Like the well-known image of the duck that can be viewed as a rabbit (or is it the rabbit that can be viewed as a duck?), the IFIs and their missions *as already constituted* can be viewed in a manner more suggestive of programs and policies that will make friends of all people of good will and that will nourish and sustain such friendships.[4]

This Essay, then, proceeds as follows: First, it diagnoses what I take to be a fundamental, root cause of the IFIs' and globalization's prodigious making of enemies—a skewing, and in this sense a failure, of vision. That failure is, ironically, itself rooted in a failure: a reluctance or an outright refusal, until relatively recently at any rate, by many lawyers and economists alike adequately to consider the *intended beneficiaries* of collective political and economic

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Lewis, *Privatize the World Bank*, WALL ST. J., June 26, 1995, at A12; Report of the International Financial Institutions Advisory Commission, submitted to the U.S. Congress and the U.S. Department of the Treasury (March 8, 2000) ["Meltzer Commission"], http://www.house.gov/jec/imf/meltzer.htm (calling for an end to the IMF practice of "extending long-term loans for poverty reduction and other purposes").

"Leftists" too sometimes raise the profligacy issue, arguing that the IFIs work as collection agencies for irresponsible lenders. But "leftists" tend to stress this little more than the "rightists" tend to stress the justice and democracy issues, generally raising it in a manner of "rear-guard" action, by way of rebuttal to the right.

4. Persons of ill will, of course, are likely to continue to carp, and to clothe their carpings in the garb of principle instead of naked preference. But we shall get to means of handling that.

action—hence, of political and economic *organizations*, and of the rules and patterned practices that constitute or contour most such actions and organizations. Pragmatically necessary collective action by organized individuals on behalf of individuals has been transmuted, through a kind of collective teleological amnesia—indeed, a species of means/ends category error—into collective action on behalf of *collectivities*. I hope that a simple reminder, a call for a return to (beneficiary-minded) "first principles," will suffice to knock the calcification from the pipes (or perhaps, to continue with the vision metaphor, the cataracts from the eyes) and prepare the way for a salutary shift in our angle of regard. This reminder also, incidentally, suggests that in some cases the IFIs, their defenders, and their critics alike have fallen into the same error—hence the aforementioned reference to "irony."

But we must do more than simply scrape the pipes or clear the eyes. In order to ensure that any appropriate shift in the angle of regard might endure—indeed, to ensure that the advocated "shift" *is* indeed appropriate, the replacing vision more than a mirage—we must proceed to the *direction* of the newly cleaned pipes' "flow," to the ideal image taking shape in place of what we have discarded. We must do more, that is, than simply *call* for a return to "first principles." We must to some extent begin to *adumbrate* those principles, to examine them and ask whether they, or our interpretations of them are worthy of pursuit. This Essay's second task, accordingly, is to extract the true ideal buried, like a sort of genetic material, in the goals of global finance, development, and integration. I briefly sketch a broad conception of global distributive justice, a conception that both fleshes out the diagnosis alluded to above, and sheds light from a new angle on the missions of the IFIs. That conception also happily illuminates some deep, decisive linkages between the theory of justice and the theory of finance. It thus also suggests new means, via the linkages subsisting in turn between financial theory and financial engineering, by which international financial *markets* can be harnessed by the IFIs (international *financial* institutions, after all) and member states to bring about a more distributively just allocation of benefits and burdens, of opportunities and risks, than we currently find across our troubled world.

The link between justice and financial engineering, via that between justice and financial theory, takes me to this Essay's third task: to sketch four fundamental types of program and proposal, and some justificatory strategies, that the IFIs ought to consider in

the way of actively facilitating more distributively just and, indeed, ultimately more effective development worldwide. While this third task must proceed summarily for present purposes,[5] I shall nonetheless hope that it proves suggestive in a helpful way. Should I succeed in what I now set out to do, we shall have before us something more than a mere grab-bag of proposals: We might have the makings of a fundamental shift in orientation, nonetheless consistent with the mandates of the IFIs, which itself can set the stage for many policy and programmatic innovations quite consistent with the "missions" of the IFIs and, therefore, with the proper, legitimate, and just ends of globalization itself.

II. A Proposed "Diagnosis" of Our Current Failure of Vision: Two Fallacies of Illicit Aggregation

A single fundamental error has vitiated much of the intellectual and practical spadework done by the legal and the economics professions. I call it the error of "illicit aggregation." Insofar as the IFIs are staffed, defended, or criticized by lawyers and economists, there is considerable risk that this error will afflict the thinking and the actions of the IFIs, their defenders, and their critics alike.[6] It is, therefore, all the more remarkable that in recent years both defenders and detractors of the IFIs have begun gradually in effect to break free of the error of illicit aggregation.[7] One hope implicit in this Essay is that we might now begin the process of systematically articulating and elaborating the comprehensive conceptual basis of this breaking-free.

The two principal forms that the error of illicit aggregation takes respectively in the legal and the economics professions can be neatly gleaned from a quick consideration of certain typical usages of the two words jointly constituting the phrase, familiar to international lawyers and economists alike, "national development." The lawyers' false aggregation is discernible in an all too common understanding of the word "national," and of variations on that term and cognate terms, such as "nation," "state," and "country."

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5. The full theory will find expression in a monograph, tentatively titled Global Justice: Mutual Remuneration, Risk-Trading, and Fair Opportunity for All, now underway.

6. Not only are they staffed and defended by lawyers and economists, but they indeed were founded by the same. *See* Hockett, *Macro to Micro*, *supra* headnote, at 165–74.

7. *See generally* John W. Head, *For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 U. Kan. L. Rev. 241 (2004) (evaluating and enumerating key structural, procedural, and constitutional criticisms of MDBs, and recommending legal steps that should be taken to correct the shortcomings).

The economists' false aggregation is manifest in an all too common understanding of the word "development," and of variations on that term and cognate terms, such as "growth," "prosperity," and "efficiency."

A. *Illicit Legal-cum-Political Aggregation: "Sovereignty" and Its "Immunities"*

Lawyers and others, principally political theorists, who influence or are influenced by lawyers, often illicitly aggregate by treating nation-states, irrespective of their decisional structures, as entities with ethical standing, as creatures bearing rights and obligations on a par with, or even superceding, the rights and obligations of the persons who constitute them, and in whose interests, when legitimate, they exist. Rather than a convenient shorthand designating the agents who work on behalf of a group of people, or the structures through which those people or their multiple agents act collectively, the word "state" and its cognates are "reified" and fetishized, taken to designate a peculiar sort of person operating in a peculiar sort of dimension—on "the international plane."[8]

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8. I do not question the utility, for many descriptive purposes, of speaking of nation-states as "actors," or of referring to the sphere of their activities as a distinct, "international" one. Nor do I question the *ethical* standing of states insofar as they truly reflect the joint interests of persons on whose behalf legitimate state functionaries operate—persons treated by those functionaries as dignitary equals possessed of equal voting rights and other forms of equal opportunity, more on which equality below. In this talk of "joint interests," I of course ignore, for the moment, the "paradoxes" of mere (interpersonally incomparable) "preference"—aggregation associated with the names of Borda, Condorcet, and, of course, Kenneth Arrow. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 9–21 (1951). I take further note of these putative paradoxes and their actual significance below. I wish only to highlight a critical category error that occurs when we move unconsciously from such descriptive or legitimacy-assuming prescriptive shorthands—abbreviative *façons de parler* in speaking of individuals acting truly collectively—to a peculiar sort of ethical ontology within which nation-states are taken for units bearing moral standing even *apart* from the relations that their functionaries bear to their other citizens.

I do not, incidentally, find that I am alone among lawyers in finding the legal form of false aggregation prescriptively pernicious, and even indeed *descriptively* misleading. Indeed, a veritable "movement" appears gradually to be gathering steam. From the prescriptive point of view, see, for example, THOMAS M. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM 1ff. (1999) ("For various reasons examined in ensuing chapters, individualism has emerged, at the end of the twentieth century, as an increasingly preferred alternative to self-definition imposed by nationalism's genetic and territorial imperatives."); and *id.* 3ff. ("Sovereignty has historically been a factor greatly overrated in international relations."). For early intimations of the "movement," see generally W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990) (discussing how the evolving concept of sovereignty in international law has embraced a definition whereby, at this late date, a domestic government can actually infringe upon the sovereignty of its own population); W. Michael Reisman, *Coer-*

This subtle elision lends itself quite readily to the moral muddles and routine category errors that are found in all too common attempts legally to insulate clerical garb-, uniform- and sunglass-clad bigots, crackpots, and criminals, as well as sundry lesser malfeasants, from international, even intranational, censure by appeals to exclusively "internal" or "domestic" spheres of legitimate action—to "national sovereignty."[9] Something very simple—one person's, or one group's, straightforwardly unjust and altogether indefensible treatment or expropriation of another person or group of persons—is as it were alchemically transfigured into something putatively complex and tangled, mysterious and beyond reproach because beyond comprehension, an "internal [or "political"] matter."[10] This species of specious agglomeration might be labeled "the error of illicit political aggregation."

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cion and Self-Determination: Construing Charter Art. 2(4), 78 AM. J. INT'L L. 78 (1984) (considering the United Nations' general prohibition of states' resort to unilateral force).

From the descriptive point of view, see, for example, the important work done by Anne-Marie Slaughter and her students over the past decade or so, much of it recently synthesized in ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (devoting specific chapters to particular theorized international governmental roles); *see also* Hockett, *Macro to Micro*, *supra* headnote, at 177, n.80 (discussing the New Haven School of international jurisprudence, a critical precedent to Slaughter's work). Slaughter, to some extent like her New Haven school predecessors, argues that we must functionally dissect the state in order to understand adequately even how *traditional state functions* are carried out in an increasingly "globalized" political environment. Her "disaggregated state" is analytically distinct from, but nonetheless bears critical conceptual affinities to, the notion of "*ethical* disaggregation" that I advance here. Our conceptions differ in much the way that description and prescription vary. Just as "ought" implies "can," and as helpful prescription requires accurate description, so my notion of the veritable ethical-status-bearing state will have, in its instantiation, to rely upon a proper understanding of how the disaggregated state actually functions. The short of it is this: States will be ethical-status-bearing aggregations only insofar as structures and modalities of the sort that Slaughter investigates serve to transmit, in the final analysis, equal decisional opportunity from their individual person-constituents to what we now might call, foreseeably but without pun intended, "end-state-action."

Appreciation for the idea of disaggregation also seems implicit, incidentally, in the gradual move from talk of "international" law to talk of "supranational," or "transnational" law. *See, e.g.*, John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, 42 U. KAN. L. REV. 605 (1994) (charting, in effect, ways in which the traditional discipline of international law itself is undergoing transformation from a state-centered to a border-softening mode of understanding, reflected in changing terminology).

9. It also lends itself to the equally familiar "domestic" moral muddles and category errors attendant upon legal appeals to "states' rights" or "sovereign immunity" in U.S. and other courtrooms.

10. Precisely such claims, familiar enough on the present international scene, were of course staples of the justificatory repertoires of defenders of slavery and Jim Crow laws in the American South, and remain staples of the Rehnquist Court's "revived federalism" today. *See, e.g.*, Fed. Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002); Bd. of Tr. v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Alden v. Maine, 527 U.S. 706

The error of illicit political aggregation afflicts criticisms of the IFIs from both the "left" and the "right." It is involved in most charges that appeal not to an apparent injustice or want of democratic legitimacy—an affront to dignitary equality[11]—entailed by a policy or program, but to a putative "violation of sovereignty," distinct from injustice or illegitimacy, entailed by the same. Such appeals generally amount to nothing more than the dignification of objections over the (policy) merits of a proposal or program with labels redolent of something "higher" or indeed much "deeper"—something "fundamental" or more "constitutional" in nature than the ("merely political") merits. As I think that we shall see, the only consideration that is intelligibly "higher" than or superordinate in stature to the (non-justicial) "merits" of a proposal is the justice or otherwise that it works between persons—the degree to which it affords persons equal collective decisional and individual life-building opportunity.

B. *Illicit Economic Aggregation: "General Welfare" (or "Wealth") and the Forgotten Ill-faring*

Economists and others, principally political and economic policy makers, who influence or are influenced by economists, often illicitly aggregate by treating "development," conceived as an end or a purpose that is in some sense worthy of collective pursuit, as something that is appropriately measured in the attainment by *summing over* persons rather than by *attending* (equally) *to* persons.[12]

(1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995).

11. I group claims of "economic unfairness" and "democracy deficit" both under the heading of distributive justice, or what I sometimes call "dignitary equality." As I shall explain below, it is probably best to view both economic fairness—the endowment of all with equal ethically exogenous allotments of productive resources or opportunities—and democracy—the collective decision mechanism that proceeds by allocating equal "weight" (voting-power) to each person equally affected by a decision—as forms of egalitarian justice, as entailments of the mandate that all persons be recognized as bearing equal moral standing. The distributive form is the same in both cases: We equalize over persons. Only the *distribuendum* differs, in one case being productive resources or opportunities, in the other case being decisional authority. More on *distribuenda* below.

12. Some aggregators, notably utilitarians, claim that summing over persons actually treats persons as equals because each person's "utility" or well-being "counts for the same" in the aggregation. *See, e.g.*, R.M. HARE, FREEDOM AND REASON (1962). This is, of course, a fatuous claim unless all persons' utility functions are identical—for example, unless all persons are born equally able to transform resources into happiness, a condition that we do not find anyone seriously maintaining is fulfilled. What is more, even were the condition to be met, fixating upon "utility," or "wealth," rather than upon the productive opportunities and resources from which well-being is actively manufactured by responsible

Between a world in which there are ten struggling persons and a world in which there are the same ten persons no longer struggling, there is "development." Between a world in which there are ten struggling persons and a world in which there are nine persons now struggling marginally more than before through no fault of their own and one person now fabulously wealthy by virtue of no responsible value-additive effort of her own, there also is "development." The failure or refusal to distinguish between these two development scenarios might be called "the error of illicit welfare [or "wealth"] aggregation." Rather than a mere pragmatically useful metric or convenient proxy by which to determine whether and by how much individual persons across the board are faring actually or potentially (via redistributive taxation) better in response both to their own efforts against a background of fair opportunity and to policies fairly decided and collectively implemented by them over time, "development" comes to designate some ghastly, depersonalized "faring-betterness" itself, abstracted both from the legitimacy of the means by which it is produced and the receptacles to which it "flows."[13] Wealth or welfare, mayhap "happiness," effectively detached from any wealthy, well-faring or happy—let alone responsible—person, is reified and rendered substance, a peculiar sort of fluid of which there is at any time "more" or "less" in the universe—a fluid which it is for some reason imperative that we ensure that there be more of irrespective of who actually bears or enjoys it or why. And "development" comes simply to name the movement from a state involving less to one involving more of this fluid.

The error of illicit welfare aggregation is as category-mistaken, muddle-prone, and mystifying as the error of illicit political aggregation, and is put to similarly pernicious ends. Imagine that somebody were to announce a global policy to maximize the space of blue-colored surface area (or, perhaps, the amount of "Aryan" genetic material) in the universe, and that all rules and policies to be enacted and implemented in future would be conceived,

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human actors, itself fails to respect human persons. For this claim fails to treat people as moral agents, responsible in part for their own happiness. We are hovering, here, about the question of the appropriate "currency" of justice; we shall get to it head-on below.

13. This depersonalization-cum-specterization of well-being parallels another instance of ghost-mongering implicit in the work of David Hume, an acknowledged founder of the aggregating, utilitarian tradition, namely his treatment of "perception" as something somehow free of any percipient being, of any perceiver. *See* DAVID HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS 183–98 (Tom L. Beauchamp ed., 1998); DAVID HUME, A TREATISE OF HUMAN NATURE (L.A. Selby-Bigge & P.H. Nidditch eds., 1985).

designed, and implemented with that end in view, regardless of the cost to any given individual or class of individuals: Would this person, or a population quiescent in the face of his suggestion, not be judged as mad?

Yet precisely such an end is envisaged and advocated, in effect or quite explicitly, by many mainstream economic thinkers, and thus pursued by many economic agencies, of the present day. For the maximization of "wealth," the money value of all goods and services, or "utility" or "pleasure" or whatever, *simpliciter*, as ends in themselves, with regard neither to the individuals who produce or experience them nor to the justice of the means or rules or practices by which they do so is in principle no different from the maximization of blue-colored surface space (or "Aryan" genetic material) across the universe. Between the two scenarios, it is only the maximandum that differs, and *no* maximandum measured solely in association with an aggregate of distinct yet undistinguished persons rather than with the individual persons who fairly or unfairly enjoy the fruits of that maximandum's maximization is intelligible as a value rather than as a fetish.[14] Insofar as

14. Here, incidentally, is the ethical basis for one way round Arrow's and the other preference-aggregation paradoxes alluded to in note 8, *supra*. It is well established that permitting the weighting of preferences by their intensities—the latter measured in my own work by "willingness to pay" in a market whose participants proceed under fair conditions from equal initial endowments, on which more below—dissolves the paradox. *See, e.g.*, JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE 36 (1996) ("[T]he key to the existence of social choice rules is the admission of some kind of interpersonal comparisons of utility."). The real normative question, then, is under what circumstances the admission of interpersonal welfare or wealth comparisons is itself both conceptually possible and ethically appropriate. An excellent collection of essays on this topic is INTERPERSONAL COMPARISONS OF WELL BEING (Jon Elster & John E. Roemer eds., 1993) (exploring various approaches to the problem of comparing the well-being of separate persons). I suggest that it is precisely under the circumstances in which resources are distributed "fairly" in the sense elaborated in Part III, *infra*, that relaxation of the criterion is appropriate. This, of course, gives rise to a possible tension with the notion, also suggested *infra*, in Part III, that (political) decisional authority, voting rights, should be market-inalienable. For realization of the equal division Walrasian equilibrium-inspired ideal would require that markets be "complete" and perhaps continuous, hence that nothing—even votes—be "outside" of "the" market. But I think that this might be a false tension, for an ideal world of "complete" markets would not be a world in which "votes" might scandalously be purchased and sold by unequally situated parties. It would, rather, be a world in which *voting itself* is simply *pervasive*, taking place in all domains and engaged in by equally endowed parties. In other words, while market-type relations might be thought to be intruded into a traditionally non-marketized realm, the reverse also would hold true: That which distinguishes the democratic voting realm from that of the market—the maintenance of equal voting power—would also now come to characterize the market realm itself, by dint of the equal ethically exogenous resource endowments possessed by all. The real question, then, is whether there are in fact, notwithstanding these observations, transactions that should nonetheless be prohibited, perhaps on paternalist or foundation-protective grounds, and

defenders and critics of the IFIs—generally from the right—ground their arguments in appeals to development conceived as a form of maximization alone without concern for the propriety of the *distribution* of what is maximized across moral *agents*, they are subject to precisely such a fetish, and fall prey to the embarrassing conceptual howlers to which defense of that fetish as a value rather than a fetish lends itself: Consequences of this (economic) version of the error of illicit aggregation.[15]

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whether any such prohibition is consistent with a satisfactory account of justice. *See, e.g.*, MARGARET JANE RADIN, CONTESTED COMMODITIES (2001); INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1998) (collecting articles regarding various notions of incommensurability); PLURALISM, JUSTICE, AND EQUALITY (David Miller & Michael Walzer eds., 1995). Perhaps Sandel was even more right than he realized in alluding, in the title of his first monograph, to "the limits" of justice. *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). The limits of justice appear to be precisely the limits of (fair) markets. I treat of this further in later work, not here. *See* Robert Hockett, *Market-Able Justice: Endowment Equality, Value-Grounded Departures from Equality, and Social Exchange* (2003) (draft on file with author). Note that concern over the idea of vote-trading might in fact stem from recognition that the distribution of other resources is unfair, and a consequent desire to preserve equality in the one realm that is not infected by ethically exogenous inequality—*viz.*, the realm of formal rights. It is possible that we would be rather less concerned with vote-trading, were all trading—including that of material goods—to take place against a backdrop of equal ethically exogenous endowments. Just as we might well be less concerned with the lessened capacity to provide for our children's futures that a one-hundred percent estate tax would entail, were that tax used to effectuate a principle of secure and equal "social inheritance" to all children at birth.

15. One such illustrative howler, since repudiated, is Judge Posner's suggestion, in the past, that legal entitlements be distributed with a view to "wealth-maximization." *See* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 496–97 (1980); *see generally* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) (arguing that "wealth maximization" provides a firmer basis for a normative theory of law than utilitarianism). See also the foundational articles of Kaldor and Hicks, from which Posner derived his suggestion: Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 551 (1939); John R. Hicks, *The Valuation of Social Income*, 7 ECONOMICA 105, 106–13 (1940). The ethical and indeed conceptual vacuity of Posner's proposal are brought out, respectively, by Ronald M. Dworkin and Jules L. Coleman. *See generally* Jules L. Coleman, *Efficiency, Exchange and Auction: Philosophical Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221 (1980) (criticizing the "wealth maximization" arguments of, among others, Richard Posner); Jules L. Coleman, *Efficiency, Utility and Wealth-Maximization*, 8 HOFSTRA L. REV. 509 (1980) (examining the relationship between utilitarianism, wealth maximization principles, and efficiency standards); Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (arguing forcefully against Posner's normative and positive economic analyses of the law); *see also* Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563, 573–90 (1980). Much the same vacuity as that noted by Coleman in respect of Posner was noted earlier by Scitovsky with respect to Kaldor and Hicks. *See* Tibor Scitovsky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77, 77 n.1, 88 (1941).

An even more egregious form of the aggregation howler than those both of Posner and of Kaldor and Hicks before him afflicts the recent neo-Posnerian work of Kaplow and Shavell, much of it collected in LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WEL-

C. *Disaggregating the False Aggregates: The Question of Global Justice*

What, then, should a prescriptive viewpoint untainted by the error of illicit aggregation—a viewpoint from which one might *legitimately* defend, criticize, or advocate the supplementation or improvement of the IFIs' current policies and practices—look like? To answer this question is in crucial part to sketch a conception of global justice—a conception as to how an allocation of certain political and economic advantages and disadvantages over persons worldwide is to be adjudged appropriate or inappropriate.[16] This Essay merely sketches preliminarily such a conception. But, as I shall next explain, the best such conception will, intriguingly and encouragingly, render perspicuous the degree to which *justice* theory dovetails with *financial* theory, hence the degree to which the

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FARE (2002). Here the category error is discernible at once in the very title of the work: "Fairness" designates a distribution principle, "welfare" a distribuendum (one can distribute welfare itself either fairly or unfairly). It is as if one were to say "Tall versus Yellow," or "East of the Y-axis versus north of the X-axis."

Incidentally, both the error of illicit political aggregation and the error of illicit welfare aggregation find canonical articulation (so to speak) and blessing in the work of Bentham. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Columbia Univ. Press 1945) (1789). The error of illicit political aggregation finds expression in the denigration of natural (basic human) rights as "nonsense on stilts," and in the attendant defense of legal positive law as not subject to any democratic legitimacy or fundamental human-dignitary constraint. The error of illicit welfare aggregation turns up in the oft-quoted and strictly incoherent doctrine that the legislator should seek "the greatest good for the greatest number." As one cannot, save in quite exceptional circumstances, maximize two maximanda simultaneously, either the "greatest good" or the "greatest number" must yield to the other in nearly all cases. And that which has yielded since Bentham is the latter.

16. To answer the question completely would be to proceed from ideal sketch to institutional embodiment—essentially, to design packages of possible arrangement connecting the prescriptions of the ideal conception to actual distributive outputs. My suspicion is that the most empirically attainable such set of arrangements, at least given some degree of "path-dependence" on the part of the future upon our present set of structures, will take cognizance of the complex reality mapped out by SLAUGHTER, *supra* note 8. The key will be to sketch both the normative constraints of the ideal conception and the positive constraints implicit in Slaughter's and related work, in order to tie realizable outputs to justice.

Please note that such a foundational view is *implicit* in the *current régime* of practice, criticism, and defense of globalization and the IFIs. The problem is simply that this view has not been systematically examined or criticized, perhaps even noticed as foundational, systematically mischievous and indeed incoherent. Hence its fundamental erroneousness has largely escaped notice, and no similarly comprehensive vision has been erected in its place. That currently dominant, inarticulate and unexamined vision is, as observed in the text, the view that all collective economically-oriented action should be taken with a view to aggregate wealth-maximization, and that aggregated states are "sovereign" irrespective of the justice of their allocations of political authority. Incoherence, of course, emerges any time that a "sovereign" of the given type refuses to pursue aggregative global wealth-maximization. An ethical disaggregation, I suggest, brings economics into harmony with politics, grounding both in a conception of justly distributed resource and authority allocation.

IFIs are particularly well positioned for purposes of understanding the requirements of, and indeed of effectuating, global justice. That conception will further render perspicuous the degree to which the advocated role is already foreshadowed and indeed entailed by those institutions' treaty-enacted and custom-evolved mandates. And it will suggest certain relatively simple and straightforward kinds of measures that those institutions might consider that they do not appear thus far to have considered systematically, by reference to a background conception of justice.

III. A Proposed "Cure" to the Fallacies and to the Consequent Failure of Vision: Meeting the Global Justice Question Head-on

On, then, to the conception of "justice as finance": The proper concerns of justice and financial theory are, perhaps surprisingly, closely interlinked. On reflection this should not be all that remarkable. For the best-known trope of modern justice theory, the "veil of ignorance," is readily appreciated as a special case of that foundational predicate to the whole of financial theory—the archetypal situation involving "choice under uncertainty." The point perhaps is best extracted and elaborated through examination of the deep conceptual and practical affinities between justice theory and a foundational subfield of financial theory, the economic theory of insurance.

Justice theory and insurance theory are closely interlinked. It is somewhat surprising that the linkage is not systematically explored, or even commonly remarked, in the ethical or economic literatures.[17] For probably the best way to characterize the remarkable

17. Ronald Dworkin probably comes closest to exploring the linkage, but his aim is perhaps better described as an insightful exploitation of, rather than a comprehensive exploration of, that linkage. *See generally* Ronald Dworkin, Sovereign Virtue (2002) [hereinafter Dworkin, Sovereign Virtue] (reprinting two prior articles and subsequent writing); Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 Phil. & Pub. Aff. 185 (1981) [hereinafter Dworkin, *What is Equality? Part 1*] (demonstrating inadequacy of welfare as a distribuendum); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 Phil. & Pub. Aff. 283 (1981) [hereinafter *Dworkin, What is Equality? Part 2*] (arguing for "resources" as distribuendum, and discussing insurance market with equally endowed participants as a model for equalizing the effects of brute luck past an initially equal allocation of opportunities). Kenneth Abraham, *Efficiency and Fairness in Insurance Classification*, 71 Va. L. Rev. 403 (1985), is more comprehensive but less systematic; indeed, there is considerable strain in Abraham's attempt to honor what are ultimately irreconcilable values. For interesting and, in some cases, important piecemeal footnotes to Dworkin, see generally Michael Otsuka, *Luck, Insurance, and Equality*, 113 Ethics 40 (2002) (discussing Dworkin's theory on equality of resources and responsible choice in a hypothetical insurance market); Robert van der Veen, *Equality of Talent Resources: Procedures or Outcomes?*, 113 Ethics 55

progress made in justice theory since the mid-twentieth century is as the gradually dawning—though still inchoate—recognition that justice itself is best modeled as in crucial part a species of insurance. And probably the best way to understand truly efficient insurance, as I shall now attempt to show, is as (nearly) distributively just risk-allocation. I examine these perspectives in turn.[18]

A. *Justice as Insurance*

Justice is concerned with appropriate distributions of benefit and burden between individuals. This suggests at least three constitutive concerns, or "variables," of justice theory[19]: (1) the word "appropriate" opens a variable for what I shall call "distribution formulae"; (2) the words "benefit" and "burden" open a variable for what I call "distribuenda"[20]; and (3) the word "individuals" opens a variable for varying conceptions of those whom I call the "distribuees."

Justice theory has tended toward, and in my own more extended work I endeavor to complete, a convergence upon the following three values as appropriately filling the three aforementioned "variables": The appropriate distribution formula is to *equalize* across persons such portions of what we hold for which we are *not responsible*, and to allow our outcomes to *vary* precisely with such

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(2002) (considering outcome-oriented and process-oriented understandings of justice in light of Dworkin's arguments); Peter Vallentyne, *Brute Luck, Option Luck, and Equality of Initial Opportunities*, 112 ETHICS 529 (2002) (advocating the equalization of initial opportunities for advantage); Kaspar Lippert-Rasmussen, *Egalitarianism, Option Luck and Responsibility*, 111 ETHICS 548 (2001) (criticizing attempts to integrate considerations of responsibility into a welfarist theory of justice).

18. For the sake of brevity, my examination is schematic.

19. I leave to one side, for the present, the theoretically and practically important questions of distributive measurement and mechanism. Those questions, as well as the three variables considered here, figure more fully in Robert Hockett, *The Deep Grammar of Distribution: A Meta-Theory of Justice* (forthcoming 2004). The idea of a concept carrying with it "variables" that must be assigned values in order for the concept to be used intelligibly finds support in the theory of "case grammar"—hence the use of the term "grammar" in the title of the aforementioned work. The *locus classicus* in the study of case grammar is the work of the linguist Charles Fillmore. *See* STUDIES IN LINGUISTIC SEMANTICS (C. Fillmore & D.J. Langedoen eds., 1971); Charles J. Fillmore, *Toward a Modern Theory of Case, in* MODERN STUDIES IN ENGLISH 361–75 (David A. Reibel & Sanford A. Schaner eds., 1969); Charles J. Fillmore, *The Case for Case, in* UNIVERSALS IN LINGUISTIC THEORY 1–88 (Emmon Bach & Robert Harms eds., 1968).

20. The "benefit & burden," or "distribution of what?" question amounts in effect to the more general form of a celebrated question raised by Amartya Sen in his 1979 Tanner Lecture. *See* Amartya Sen, *Equality of What?, in* EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES 307, 307 (Stephen Darwall ed., 1995). *See also* G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 906, 941–44 (1989).

variable efforts as for which we *are* responsible.[21] While it sometimes can be difficult, if not impossible, empirically to sort between these sources of our faring in specific cases (carrying out an ethically critical process that I call "justice-accounting"), as a theoretical matter the distinction seems clear enough.[22] Variations on this view of justice now increasingly are labeled as the "luck-egalita-

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21. Our outcomes and our responsible efforts, of course, will often be mediated by some form of recompense—"payment"—from others for those efforts. This conception of justice therefore incorporates a role for social value—the valuing and devaluing by others of what we do or fail to do. It is that mediation that renders this conception friendly both to efficiency and to markets, as further noted below. Provided that a market be "fair" and "complete" in senses to be elucidated below, *price*-indices reflecting social rates of *valuation* of one's efforts will emerge, and permit us precisely to commensurate and value varying productively responsible efforts.

Incidentally, this formula suggests where aggregation will not be illicit. We should aggregate, and maximize subject to an equal distribution constraint, ethically exogenous opportunity; and we should aggregate, and minimize subject to an equal distribution constraint, ethically exogenous risk. And we should treat differential farings consequent upon differential expenditures of ethically endogenous efforts as simply outside of the purview of aggregation.

22. There is, however, some disputation on just how to draw the "cut." Some appear to frame the distinction as that between metaphysically free "choice" on the one hand, and metaphysically determined "circumstance" on the other, *see* JOHN E. ROEMER, EQUALITY OF OPPORTUNITY 5 (1998); Richard Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFF. 159 (1990) (defending a redistributive regime under which resources are valued based on individual citizens' subjective valuation of resources with respect to her conception of her own welfare); Richard Arneson, *Equality of Opportunity for Welfare*, 56 PHIL. STUD. 77, 78–79 (1989) [hereinafter Arneson, *Equality of Opportunity for Welfare*]; Cohen, *supra* note 20, and such is the "cut" which Samuel Scheffler attributes to all of the so-called "luck-egalitarians." *See* Samuel Scheffler, *What is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5 (2003) (comparing various theories set forth by "luck egalitarians"). By contrast, many scholars, including the author, assimilate responsibility not to metaphysically undetermined choice, but rather to what I call "affirmation," "ratification," or "identification with." T.M. Scanlon, *The Significance of Choice*, 8 TANNER LECTURES ON HUMAN VALUES 151, 185–89 (S. McMurrin ed., 1988) [hereinafter Scanlon, *The Significance of Choice*]; DWORKIN, SOVEREIGN VIRTUE, *supra* note 17; Dworkin, *What is Equality? Part 1*, *supra* note 17; Dworkin, *What is Equality? Part II*, *supra* note 17; T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 665–69 (1975) [hereinafter Scanlon, *Preference and Urgency*]. The idea is that one is responsible for what she affirms or embraces, which might but need not be that over which she exercises metaphysically free, causative influence. Affirmation is the more inclusive concept. One may identify with a choice that one in some mysterious metaphysical sense did not "really," or "freely," make. It is difficult, on the other hand, to imagine one's not being held "constructively," in the legal sense, to affirm such choices as she *does* "really" make. The cut in the latter case is between that which one embraces and that which one sincerely repudiates at the time of its occurrence, a distinction that is both free of any metaphysical position that one might take with respect to the question of causality, and more consistent, I believe, with dignitary respect afforded persons, though it of course also lends itself to epistemic difficulties in the matter of determining with what, precisely, individuals have "identified themselves" in many particular cases. But we are here concerned first with ideal theory, turning only later to matters of implementation. For practical purposes there will be much overlap between those who hold persons responsible for choices, and those who hold persons responsible for their affirmations.

rian," or "responsibility-tracing egalitarian," ideal.[23] The guiding intuition is that we should seek to neutralize—as it were, to "equalize"—the effects of brute luck or fortune, while allowing differential diligence (including differential "option luck," that is, fortune consequent upon responsible choice, for example, outcomes of voluntarily undertaken gambles) to result in differential outcomes. I describe this as treating fortune as "ethically exogenous," and treating responsibility as "ethically endogenous." Under this conception, note the friendliness of justice both to markets and to our ordinary understanding of the concept of productive *efficiency*, that is, to the production, via what *counts* as "diligence," of social value, or "wealth."

The view just sketched of the proper distribution formula dovetails with a view of distribuees as *responsible agents*—as forgers or ratifiers of significant portions of their own fates—rather than, for example, as addicts or as patients, as altogether passive victims or beneficiaries of fortuity or charity.[24] Those two views, of distribu-

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23. I prefer the term "endowment-egalitarian" for reasons stated in Hockett, *Three Pillars*, *supra* headnote, but we need not quibble here. *See generally* Scheffler, *supra* note 22 (arguing that luck elagitarianism misconstrues the ideal of equality); Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999) (arguing that the point of equality is not so much to compensate people for undeserved bad luck, as to create a democratic society entitling all citizens to the goods they need to function freely and equally and to avoid oppression by others); Arthur Ripstein, *Equality, Luck, and Responsibility*, 23 PHIL. & PUB. AFF. 3 (1994) (answering critics of liberalism by arguing that its notion of "egalitarianism" encompasses individual responsibility and arguing that liberals would do well to make explicit the notion of responsibility that their view implicitly incorporates). Representative "luck-egalitarians" include Arneson, Dworkin, Roemer, and arguably Rawls. *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 17; Cohen, *supra* note 20; ROEMER, *supra* note 22; JOHN RAWLS, A THEORY OF JUSTICE 133–34 (1971); Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, *supra* note 22; Arneson, *Equality of Opportunity for Welfare*, *supra* note 22; Dworkin, *What is Equality? Part 1*, *supra* note 17; Dworkin, *What is Equality? Part II*, *supra* note 17. There is, however, some debate on whether to include Rawls. *See* Scheffler, *supra*. A particularly elegant summation for present purposes, though one in which the ethically exogenous endowment is treated as static and thus which does not reach the mechanism of contingent claiming, is Hillel Steiner, *Choice and Circumstance*, *in* IDEALS OF EQUALITY 95, 95–111 (Andrew Mason ed., 1998). What I have called "the exogenous endowment," Steiner suggestively (for purposes of future international welfare policy) calls "the global fund." *See also* HILLEL STEINER, AN ESSAY ON RIGHTS 270–281 (1994). Steiner's suggestive language and ethical conceptualization of a "global fund" can be viewed as affording particularly compelling support to the idea of a "global resources dividend," as advocated by Thomas Pogge in a series of essays now synthesized in THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS 196–215 (2002). Indeed, Hillel's vision affords strong support of much more.

24. *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 17; Scanlon, *The Significance of Choice*, *supra* note 22, at 185–89; Dworkin, *What is Equality? Part 1*, *supra* note 17; Dworkin, *What is Equality? Part II*, *supra* note 17; Scanlon, *Preference and Urgency*, *supra* note 22; *see also* Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE L.J. 2291, 2294–97 (2003) ("agents" versus "patients").

tion rule and distribuee, dovetail in turn with a view of the salient distribuenda[25] as *opportunities* and *risks*.[26] Distribuees are (again, "ethically endogenously") responsible for making their own happiness of their ("ethically exogenous") opportunities, which constitute a kind of "resource," and indeed for making additional opportunities of such raw materials as they are dealt. They are also (ethically endogenously) responsible for mitigating, insofar as they are able, such (ethically exogenous) *harms*—as it were "*negative* raw materials"—as they are dealt. But, by definition, they are *not* responsible for the *hands themselves*, and the opportunities and risks included in them, that they are dealt over time.

Perhaps the best way to illuminate more comprehensively the linkages among distribution formula, distribuee, and distribuendum is as follows (note how the fuller visualization begins to suggest an institutional embodiment): Intuitively, as a matter of mechanism, the best way simultaneously to equalize exogenous endowments (including "internal" capacities to transform "external" endowments into satisfactions) and hold people responsible for the product of endogenous (differentially diligent or culpable) behavior is to afford everyone both (a) equal (and perhaps inalienable)[27] formal legal and political opportunity and standing, and (b) equal shares of everything else (all that is alienable—essentially *material* goods, or shares thereof) at t_0, then both (c) to allow them to trade to welfare-maximizing equilibria from those identical initial "baskets" of material, alienable resources (which, recall, amount to welfare-opportunities) and (d) to trade *contingent compensatory claims* upon one another to provide against such welfare-*risks* (as it were "negative resources"—principally talent-deficits, mental or physical handicaps, and genetically determined dispositions to illnesses) as might eventuate at any $t_{n>0}$. The mentioned

25. Sometimes called the "currencies" of justice. *See* Cohen, *supra* note 20.

26. For Arneson they are "opportunit[ies] for [and presumably "risks to"] welfare." For Cohen they are "access to [and presumably "blockages from"] advantage." For Roemer they are "opportunit[ies] [and presumably "risks"]." And for Dworkin they are (quite abstractly conceived, hence opportunity-like) "resources." I argue in *Grammar*, *supra* note 19, that these are all, in their theoretic essentials, much the same, what subtle variations there are being rooted in what counts as an appropriate conception of responsibility. The account of the latter affects articulation of the distribution formula or characterization of the distribuenda. The same end-state distribution can be attained by either means, meaning that valuations of these variables tend to countervary, distributive result amounting to a kind of "isoquant." *See* Hockett, *Grammar*, *supra* note 19. Marc Fleurbaey appears to agree. *See* Marc Fleurbaey, *Equality of Resources Revisited*, 113 ETHICS 82, 83 (2002) (commenting that the theories of Arneson, Cohen, Dworkin, Rawls, Roemer and Sen are "closer to each other than appears at first glance").

27. *See supra* note 12.

risks are future contingencies about which all have equal knowledge and control at t_0 itself, since such knowledge and control are part of the equalized exogenous initial endowment (which not only is a formal legal and a material, but also an informational endowment), for which our agents, recall, by definition are not responsible.[28]

"Ideal" justice, then, on this view of distribuees, distribuenda, and appropriate distribution formulae, is a kind of ongoing, lifelong market in goods, services, options, and insurance carried on within the contours of political arrangements guaranteeing equal (and probably inalienable) formal legal opportunity, the participants in which market initially are equally endowed with knowl-

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28. There is a rich but, surprisingly, largely ignored economic literature, grounded originally in the work of Walras, which is generally supportive of this conception of justice as in part a "superfair," or "envy-free" allocation of material resources. *See* SERGE-CHRISTOPHE KOLM, JUSTICE ET EQUITÉ (1972) (developing a fairness-as-no-envy approach to the theory of distributively just resource allocation); Duncan Foley, *Resource Allocation and the Public Sector*, 7 YALE ECON. ESSAYS 45 (1967) (defining a fair allocation as one in which no one envies the consumption bundle of any other); *see also* Hal Varian, *Equity, Efficiency, and Envy*, 9 J. ECON. THEORY 63, 64–65 (1974); Hal Varian, *Two Problems in the Theory of Fairness*, 5 J. PUB. ECON. 249, 250–51 (1976). See generally the very important collection SOCIAL GOALS AND SOCIAL ORGANIZATION: ESSAYS IN MEMORY OF ELISHA PAZNER (Leonid Hurwicz et al. eds., 1985) (including Pazner's and Schmeidler's ground-breaking explorations of the early 1970s). A useful survey and synthesis of this literature is WILLIAM BAUMOL, SUPERFAIRNESS: APPLICATIONS AND THEORY (1986).

"Arrow-Securities" has become the term of art for contingent compensatory claims of the sort mentioned in the text—claims which, when added to the stock of "resources" traded to an envy-free equilibrium (sometimes called an "equal division Walrasian equilibrium"), enable parties in effect to add what I have above called (unavoidable) "negative resources," the "natural" or "brute" (that is, the "ethically exogenous") distribution of which becomes known only over time, to the mix. They are, in essence, contracts entitling purchasers to predetermined unit-payouts upon the eventuation of sundry predefined contingencies. Arrow and Debreu both have proved formally that a complete market in such contracts would permit an intertemporal general equilibrium, with all of its familiar optimality properties, in the face of uncertainty. *See* GERARD DEBREU, THEORY OF VALUE 90–102 (1959); Kenneth J. Arrow, *Le Rôle de Valeurs Boursières pour la Répartition la Meilleure des Risques*, 40 ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE 41, 41–47 (1953); Maurice Allais, *Généralisation des Théories de L'Equilibre Economique Général et du Rendement Social au Cas du Risque*, 40 ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE 81, 81–109 (1953); *see generally* Maurice Allais, *L'Extension des Théories de l'Equilibre Général et du Rendement Social au Cas du Risque*, 41 ECONOMETRICA 269 (1953) (attempting to "generalize the classical theory of economic equilibrium and of welfare economics to the case of risk"). The results are anticipated by JOHN R. HICKS, VALUE AND CAPITAL 130–40 (1939) (articulating a theory from observations of the behavior of early twentieth-century British futures markets). *See generally* JAMES MAGILL & MARTINE QUINZII, 1 THEORY OF INCOMPLETE MARKETS 1–10 (1996) (thoroughly synthesizing prior and recent theoretic developments). We shall see below that it is quite helpful that the tradition of economic theory most useful to an understanding of justice is also that tradition from which modern financial and financial-engineering theory have emerged.

edge of and control over future contingencies. It is the continuously fluctuating, yet continuously fair, outcome of an iterated set of fair trades, kept fair by appropriate exogenous-endowment equality-protective regulation, freely conducted by equally situated parties,[29] some of whom are willing to purchase, at the price of consumption forgone now, contingent future compensation from others who themselves perhaps prefer more consumption now, in the event that undesired fortuities should eventuate later.

William Vickrey, John Harsanyi, and other "veiled" utilitarians evidently were groping (very tentatively, and in a merely two-period, discrete-timed, non-dynamic way) toward this image. The veil of ignorance that they employed in justifying utilitarian distribution principles was essentially a contrived equalization of the informational and initial resource endowment, under which circumstance, these thinkers believed, parties all voluntarily "would" purchase what we might call the utilitarian "policy," namely the aggregate- or average-utility-maximizing distribution formula.[30] John Rawls in large part did the same thing, but imputed a different choice of distribution formula, namely the maximin policy, pursuant to which the prospects of the least well-off would trump those of everyone else.[31] In both cases, the imputations entailed, in effect, attributions of extreme attitudes toward risk to the "insurers": Rawls an extreme aversion to risk;[32] Harsanyi and others an

29. "Equally," as used here, pertains only to the ethically exogenous, endowment-originating portion of one's holdings, pursuant to the "luck-egalitarian" conception described above.

30. In a 1953 paper, Harsayni "proved" that agents choosing from among possible social states from behind a veil of ignorance and conforming to the axioms of von Neumann-Morgenstern expected utility theory would choose to maximize average utility. In a 1955 paper, he "proved," roughly speaking, that a society that "chose" as would such von Neumann-Morgensternian persons over lotteries (the society thus being conceived as a sort of wagering "superperson") would "choose" to maximize aggregate utility. Vickrey appears to have suggested Harsanyi's employment of a "veil." *See* John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk Taking*, 61 J. POL. ECON. 434, 434 (1953); John C. Harsanyi, *Cardinal Welfare, Individual Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309, 310 (1955). *See generally* William Vickrey, *Utility, Strategy, and Social Decision Rules*, 74 Q.J. ECON. 507 (1960) (discussing the role of the veil of ignorance and how an individual actor's lack of bias affects strategy determinations and alternative choices for a social welfare function).

31. See, of course, JOHN RAWLS, A THEORY OF JUSTICE 133–34 (1971).

32. *See, e.g.*, GEOFFREY A. JEHLE & PHILIP J. REMY, ADVANCED MICROECONOMIC THEORY 260 (2d ed. 2001); Leonid Hurwicz, *Optimality Criteria for Decision Making Under Ignorance*, 370 STATISTICS 1 (1951) (Maximin scores a perfect "1" on "pessimism index"); Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls's* Theory of Justice, 70 J. PHIL. 245, 249–257 (1973); John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory*, 69 AM. POL. SCI. REV. 594, 594–600 (1975).

extreme cavalierity in respect of the same. Ronald Dworkin, rather more exactingly, though nonetheless (and one presumes unavoidably) in armchair fashion, considered the likely choices of our (now equal-resource-dividing, or equal-opportunity-ensuring) "insurers" on the basis of behavior observable in *actual* insurance markets—the insurance metaphor at last was recognized explicitly and taken seriously—but again the choices were, in the final analysis, imputed:[33] "One size" was selected to "fit all"; and though, presumably, it did fit more would-be wearers than did the "sizes" of the veiled utilitarians and Rawls, there must of course be many whom the garment simply does not clothe.

Now, suppose that we could offer to our individual human agents as options-bearers and insurers *actual*, rather than *imputed*, choices. And suppose that we could somehow simulate, with real markets, the ideal market that so well serves as a model for intuitively appreciable resource- or opportunity-justice: Might we get our sizing straight? Before turning to that prospect, I examine the justice/insurance relationship from the other side of the disciplinary divide, the insurance side. This examination both further illuminates the underlying unity of justice and insurance hence finance, and takes us to certain new "market-based" forms of distributively just opportunity- and risk-allocation that the IFIs might facilitate in keeping with their mandates.

B. *Insurance as Justice*

Insurance is a means of pooling, generally through trade, broad categories of risk, the eventuation of which in relation to the pool's risk-bearers considered as a whole are reasonably affordable while in relation to all or most risk-bearers taken as individuals are not.[34] (Herewith, of course, the source of insurance's capacity more efficiently to *allocate* risk-bearing.) That very definition of insurance implicitly contains within it three commonly remarked prerequisites to efficiently operating, sustainable insurance markets.[35] As we shall see, with one caveat, the same practical measures that

33. *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 17; Dworkin, *What is Equality? Part 1*, *supra* note 17; Dworkin, *What is Equality? Part 2*, *supra* note 17.

34. One can hardly improve upon the venerable Adam Smith: "The trade of insurance gives great security to the fortunes of private people, and by dividing among a great many that loss which would ruin an individual, makes it fall light and easy upon the whole society." ADAM SMITH, 2 AN INQUIRY INTO THE NATURE AND CAUSES OF WEALTH OF NATIONS 281 (Edwin Cannan ed., Univ. of Chicago Press 1976) (1904).

35. A rough parallel, perhaps, to the earlier suggestion that justice's concerns open three "variables."

ensure that those prerequisites are *met* facilitate the *just*, not only the efficient, allocation of risk. Practically efficient insurance and distributively just risk-allocation are near extensional equivalents.

The first requirement of an efficient and sustainable insurance market is the so-called independence[36] of insured events. For risk-pooling to succeed, risks that would be pooled must actually eventuate for but a fraction, at most, of the risk-pool. The *ex ante* probability of the insured event's befalling one prospective member of the pool therefore should be orthogonal to its befalling another such prospective member. Wavelike, catastrophic, covarying events (within the pool) generally are *not* insurable.[37]

The second requirement of an efficient and sustainable insurance market comprises the determinability and cost-estimability of insured events. The insured event must be well-defined, its occurrence readily verified. The probability and cost, that is "probable cost," of its eventuation must be roughly ascertainable *ex ante*.[38]

The third requirement of an efficient and sustainable insurance market is symmetrically distributed information among insurers and insureds as to the likelihood of the insured event's occurring.[39] Prospective insurers and insureds must be more or less

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36. Also variously referred to as "orthogonality," "randomness," "non-covariance," or "non-catastrophicity."

37. *See, e.g.*, EMMETT J. VAUGHAN & THERESE M. VAUGHAN, FUNDAMENTALS OF RISK AND INSURANCE 29 (7th ed. 1996); J. FRANÇOIS OUTREVILLE, THEORY AND PRACTICE OF RISK AND INSURANCE 132–33 (1998); ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 167–208, 436–73 (1995); HAL R. VARIAN, MICROECONOMIC ANALYSIS 172–94 (3d ed. 1992); KARL H. BORCH, ECONOMICS OF INSURANCE 163–74 (1990); DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 71–124, 577–715 (1990).

38. *See, e.g.*, VAUGHAN & VAUGHAN, *supra* note 37, at 21–22; OUTREVILLE, *supra* note 37, at 132–33; *see also* MAS-COLELL ET AL., *supra* note 37; VARIAN, *supra* note 37, at 172–94; KREPS, *supra* note 37, at 71–124, 577–715; Kenneth J. Arrow, *Information and Economic Behavior*, *in* 4 THE COLLECTED PAPERS OF KENNETH J. ARROW: THE ECONOMICS OF INFORMATION 136, 165 (1984).

Note that we can sum-up the requirements stated in a & b as follows: It is commonplace that the insurance premium P for insured event *i* (P*i*) must be equal to the probability of the insured event's occurring (p*i*) multiplied by the loss that will thereby be occasioned (L*i*) and by an administrative cost (*a*). In short, P*i* = (1+*a*)p*i*L*i*. Now if the probability of the event occurring is certain, such that p*i* = 1, then P*i* = (1+*a*)L*i*, and the premium exceeds the loss. If p*i* is unknown, on the other hand, there will be no P*i* at all.

39. *See, e.g.*, VAUGHAN & VAUGHAN, *supra* note 37, at 5–6, 21–22; OUTREVILLE, *supra* note 37, at 166–67; MAS-COLELL ET AL., *supra* note 37; VARIAN, *supra* note 37, at 172–94; BORCH, *supra* note 37, at 315–30; KREPS, *supra* note 37, at 71–124, 577–715; *see also* Kenneth J. Arrow, *Risk Allocation and Information: Some Recent Theoretical Developments*, 8 GENEVA PAPERS ON RISK & INSURANCE 1 (1978). *See generally* Michael Rothschild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q.J. ECON. 629 (1976) (discussing and modeling the adverse impacts of asymmetric information upon insurance markets); Kenneth J. Arrow, *Limited Knowledge and Economic*

equally informationally endowed with respect to the salient risk. There are two commonly remarked vitiating consequences of asymmetrically distributed such information (note the ethically pregnant language of these insurance business terms of art).

The first vitiating consequence of asymmetrically distributed information is that of adverse (or "anti-") selection. Where the insured is positioned to know more about the probability of the insured event's occurrence than is the insurer, insurers fear selection-bias on the part of those seeking insurance. Expecting the worst, they charge higher premiums or withdraw altogether.[40] (Here is the basis of "Gresham's Law"—that "bad risks drive out the good"—and of the oft-noted pathologies of the "Market for Lemons.")[41]

The second vitiating consequence of asymmetrically distributed information is moral hazard. Where the insured not only better knows or is able to conceal the relevant probability but is able to manipulate or affect it, insureds might slacken efforts to avoid a risk's eventuation, or even act to bring it about, owing to the potentially perverse incentive-effects of insurance itself.[42]

Analysis, 64 AM. ECON. REV. 1 (1974) (arguing that economic uncertainty is partially the result of difficulty in modeling the ignorance of economic agents).

40. *See, e.g.*, BERNARD SALANIÉ, THE ECONOMICS OF CONTRACTS: A PRIMER 11–83 (5th ed. 2002); OUTREVILLE, *supra* note 37, at 152, 179–80; BORCH, *supra* note 37, at 319–25. More formally, see JACK HIRSHLEIFER & JOHN G. RILEY, THE ANALYTICS OF UNCERTAINTY AND INFORMATION 307–13 (1992); LOUIS PHLIPS, THE ECONOMICS OF IMPERFECT INFORMATION 57–88 (1988).

41. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 487, 488–500 (1970). More generally and more formally, see L. Glosten & Paul Milgrom, *Bid, Ask, and Transaction Prices in a Specialist Market with Heterogeneously Informed Traders*, 13 J. FIN. ECON. 71 (1985) (arguing that the "bid-ask spread" in a specialist market is influenced by the difference in the quality of information available to specialists and customers).

To recur to the formulaic treatment at note 38, *supra*, efficiency also "requires" that, for persons 1 & 2, $Pi1 > Pi2$ if $pi1 > pi2$. But if all pay $Pi2$, then there will be insufficient supply, while if all must pay $Pi1$, there will be insufficient demand.

42. *See, e.g.*, M.V. Pauly, *The Economics of Moral Hazard*, 58 AM. ECON. REV. 531 (1968) (arguing that the absence of insurance against some uncertainties in the private market may be due to nonoptimality as opposed to market failure); SALANIÉ, *supra* note 40, at 107–42; OUTREVILLE, *supra* note 37, at 133–34, 179–80; HIRSHLEIFER & RILEY, *supra* note 40, at 296–307; BORCH, *supra* note 37, at 325–30; PHLIPS, *supra* note 40, at 57–58; Arrow, *supra* note 38, at 165.

In terms of the formulaic summation at note 38, *supra*, moral hazard brings about a state in which $pi = 1$, or at any rate in which $pi > Pi/(1+a)L$, such that the premium exceeds the loss and thus renders the market impossible to maintain. A putative concern with moral hazard was of course a principal reason offered for Congress's passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

There are several commonly employed practical means—some introduced by insurers and permitted by law, others afforded more directly by the law itself—of ensuring that the three prerequisites to efficient insurability obtain.[43] With one critical exception, the same means as render *insurance efficient* render *risk*-allocation more *just.*

Event independence is ensured in two ways. We broaden—ideally, universalize—the (exogenous) risk-pool, and separate off—"segment," or "classify"—(endogenous) risks that we come to recognize consistently to co-vary, to be "caused" in their eventuation by, known "risk-factors."[44] Now note that universalizing the risk-pool, at least with respect to truly exogenous, unavoidable risks, is precisely what justice would mandate; it is mandated by justice's equality component. Note also that separating-off risks that are, through responsible, diligent behavior, avoidable or mitigable—that is, ethically *endogenous* risks—also is mandated by justice, by justice's "responsibility-tracing" component. Universalizing the pool of exogenous risk-bearing, then, is a requirement of justice's equalizing imperative, while segmenting endogenous, faultable risk-incurring is a requirement of justice's responsibility-tracing imperative.

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43. Most such means have been developed by insurers. The law has in significant measure come to authorize the practices, though sometimes intervening to ensure fairness. *See generally* TOM BAKER, INSURANCE LAW AND POLICY: CASES, MATERIALS AND PROBLEMS 3 (2003) (discussing the diversification and coverage of large groups of persons by insurance companies in order to maintain efficient insurability); ROGER C. HENDERSON & ROBERT H. JERRY II, INSURANCE LAW: CASES AND MATERIALS 3 (3d ed. 2001) (discussing diversification, limitations on the probability and effects of loss and insurance of large groups of persons as ways to generate a sustainable insurance market); KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 4 (2d ed. 1995) (providing examples where the law has authorized practices of ensuring that the three prerequisites to efficient insurability obtain while sometimes intervening to ensure fairness); ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES 11 (1988) (providing further examples where the law has authorized practices of ensuring that the three prerequisites to efficient insurability obtain while sometimes intervening to ensure fairness).

44. *See* VAUGHAN & VAUGHAN, *supra* note 37, at 21; OUTREVILLE, *supra* note 37, at 132. Broader pooling also improves estimability, through the operation of the "law of large numbers." VAUGHAN & VAUGHAN, *supra* note 37, at 21. On risk-classification, see MICHAEL H. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 16–18 (1999); OUTREVILLE, *supra* note 37, at 150–51; Abraham, *supra* note 17. Formally, discovery of more fine-grained statistical or micro-statistical ("causal") relations between sub-features ? and d of events G and ?, for example, will render the *degree* of covariance between G and ? more predictable. One might, for example, upon such discovery, find that G\ ? and ?\ d can be *separately* insured because it is only ? and d that actually covary. That is, entire classes of such *sub*-features might indeed be *separately* insurable.

The *law* tends to *authorize* these forms of pool-universalization and risk-segmentation: No one is permitted to "opt out," for example, of U.S. social security or most counterpart programs found in other jurisdictions. And there are few, if any, legal restrictions anywhere upon so-called "bonus/malus" (again, note the morally charged connotation of this insurance term of art) premium-structuring pursuant to which, for example, unsafe drivers or smokers are charged higher premiums, by the insurance industry. Now note that the one form of risk-classification or -segmentation that *would* offend justice—segmentation on the basis of *ineluctable* (hence, ethically exogenous) traits—often (though perhaps not often enough!) tends to be regarded with *suspicion* by the law. The classic case here is the prohibition of discrimination on the basis of genetic information by health insurers or employers.[45]

Turning to the second prerequisite to sustainable insurance markets, determinability and probable cost estimability are effected, as is event independence, by the advancement of scientific knowledge and the broadening of the risk pool, both of which phenomena go significantly hand in hand.[46] Broadening the risk pool tends to result in standardization of contracts, consequent minimization of administrative and transaction costs, liquidity in the insurance market and sharpening of the definitions of insured events. Broadening and sharpening also tend to "incentivize" the collection of additional data on the precise causes and likelihoods of insured events' eventuation. Precisely the same means tend to facilitate what I above called the "justice-accounting" implicitly required by the luck-egalitarian ideal in justice theory. That ideal requires careful tracing of the results of, thus of the precise boundaryline separating, what is ethically exogenous and beyond control or anticipation on the one hand, and what is ethically endogenous and within our ken and capacity on the other.

As for sustainable insurance's third prerequisite, asymmetric information is, in the insurance context—where neither insureds nor insurers have conferred (ethically endogenous) benefits upon one another such as would warrant a departure from the (ethically exogenous) equality baseline—simply *equally distributed* informa-

45. *See, e.g.*, Genetic Nondiscrimination in Health Insurance and Employment Act, H.R. 602, 107th Cong. (2001); A Bill to Prohibit Discrimination on the Basis of Genetic Information with Respect to Health Insurance, S. 318, 107th Cong. (2001); A Bill to Protect the Civil Rights of All Americans, and for Other Purposes, S. 19, 107th Cong. (2001).

46. *See, e.g.*, VAUGHAN & VAUGHAN, *supra* note 37, at 21; OUTREVILLE, *supra* note 37, at 132–33.

tion.[47] The methods typically employed to combat the effects of asymmetric information and thus render insurance efficiently providable, accordingly, also tend to render information- and risk-allocation more just. There are two broad classes of such methods: what we might call "leveling-up" and "leveling-down." Again they have emerged from insurance practice and the law alike.

Leveling-up is effected by means of transparency rules, for example, rights to pre-inspection, or the "disclose" component of the U.S. Securities and Exchange Commission's (SEC) "disclose or abstain" reading of Rule 10b-5, the principal regulatory provision prohibiting insider trading.[48] Leveling-down is effected by means of what I call "simulated shared opacity," for example, express or implied warranties, preexisting condition clauses, or the "abstain" component of the SEC's reading of Rule 10b-5.[49] (Simulated shared opacity is, of course, the imposition of our friend from justice theory, a "veil of ignorance.") Note that "leveling-up" methods tend to enhance both justice and "efficiency" (conceived as wealth-maximization). Only "leveling-down" methods might be thought to diminish, to some extent, efficiency conceived as wealth-maximization in some contexts. As to this latter point, however, it must be stressed both (a) that the effect here would tend to be ambiguous, in light of the demoralization effects that injustice can bring (a commonly offered efficiency-justification for the SEC's "disclose or abstain" rule for example: participants will withdraw from, hence deliquify and render less efficient, a market that they think unfair); and (b) that "efficiency" pursued *apart* from justice, as noted at Part II.B, above, amounts to outright fetishism.

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47. More on this matter in Robert Hockett, *Fairness in Finance: Baseline Equality, Merited Advantage, and the Just Allocation of Asset-Value-Pertinent Information as Regulatory Norms* (in progress, manuscript on file with author).

48. See, of course, 17 C.F.R. § 240.10b-5 (1948) (implementing 15 U.S.C. § 78j(b)), and the two canonical decisions interpreting it: *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 847 (2d Cir. 1968) (en banc), and *In re Cady, Roberts & Co.*, Exchance Act Release No. 34-6668, 40 S.E.C. 907, 910–15 (Nov. 8, 1961). *But see* Dirks v. SEC, 463 U.S. 646, 653 (1983); Chiarella v. United States, 445 U.S. 222, 225–30 (1980).

49. *See generally* VAUGHAN & VAUGHAN, *supra* note 37, at 29, 170–71, 312, 382–83, 585–86; OUTREVILLE, *supra* note 37, at 150–52; BORCH, *supra* note 37, at 318; Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963), *reprinted in* 6 COLLECTED PAPERS OF KENNETH J. ARROW: APPLIED ECONOMICS 15 (1985) (discussing the need for an insurance system based on risk-shifting economic models); Kenneth J. Arrow, *Insurance, Risk, and Resource Allocation*, *in* 4 THE COLLECTED PAPERS OF KENNETH J. ARROW: THE ECONOMICS OF INFORMATION 85, 86 (1984) [hereinafter Arrow, *Insurance*] (discussing risk reallocation in the insurance system); John S. Fleming, *Aspects of Optimal Unemployment Insurance*, 10 J. PUB. ECON. 403 (1978) (same); Kenneth J. Arrow, *Optimal Insurance and Generalized Deductibles*, 74 SCANDINAVIAN ACTUARIAL J. 1 (1974) (same).

So we observe that, from the insurance side of the justice/insurance dyad just as surely as from the justice side, opportunity- and risk-distributive justice on the one hand, efficient insurance purchased and sold by equally endowed, boundedly rational agents on the other, can be seen by and large as co-extensive. And from these intriguing linkages we also can begin to draw a bead upon some very concrete, practical measures that can be employed to render the distribution of at least one, and perhaps the only appropriately conceived, form of distribuendum—financial *opportunities* and *risks*—both more just and more efficient. This takes us to the next part of this Essay: an elaboration of the basic classes of both policy and program that should constitute the IFIs' agendas.

IV. Financial Agents of "Financial Justice": Program and Policy Types that the IFIs Ought to Embrace, and the Form that Their Responses to Their Critics Ought to Take

The conception of justice elaborated above, and its linkages with the theories of finance and insurance, suggest both certain kinds of policy and program that the IFIs should undertake, and the general form that their replies to critics of such policies and programs should take. For the limited purposes of this Essay I avoid intricately-detailed, blueprint-like proposals.[50] The best way to satisfy the twin desiderata of spatial concision and programmatic comprehensiveness is to proceed by essential reference to two critical axes, one rooted in the "benefit" and "burden" divide with which I opened the discussion of justice in Part III.A above, the other rooted in the distinction between "program" and "policy" implicit in the structures of the IFIs' constitutive mandates themselves.[51]

A. *"Benefits" and "Burdens"*

As noted above, justice is concerned with the distribution of *benefits* and *burdens*, "good things" and "bad things," over individuals. Moreover, justice respects individuals as *moral agents*, *responsible* in part, through *ex ante* planning, for their own well-being or ill-faring. It accordingly mandates that those portions of persons' well- or ill-faring for which they cannot reasonably be held responsible

50. For the same reason, I lump the IFIs together for the present. For an intimation of a view of the distinct roles of the IMF on the one hand, the International Bank for Reconstruction and Development (IBRD) on the other in connection with the vision that I here elaborate, see Part V, *infra*.

51. I cite principally to the constitutive documents of the IMF and the IBRD, but the points are generalizable.

should be equalized so far as possible—an entailment of treating them as moral equals—and that those portions of their well-being or ill-faring for which they *are* indeed responsible, through the planning and the executing of their actions, should be allowed to vary with their varying degrees of socially valued or disvalued ("productive" or "wasteful") responsibility. This suggests that "benefit" and "burden," for purposes of a responsible agent-respecting conception of justice, should be conceived in large, if not in full-part from an *ex ante* viewpoint; that is, they should be conceived from the viewpoint of life- and action-planning agents prior to their exercises of responsible, forward-looking agency. That in turn suggests that the appropriate conception of "benefit" and "burden" for purposes of global justice is as *ethically exogenous opportunity and risk.*

Opportunities include access to: a human health-sustaining environment; productive capital (including the development of "human capital"—education and training); positions of organized *political* and *economic* agency (for example, political and corporate office, in view of the fact that many human operations must be carried out, quite literally, *co*operatively); and relatedly to joint-agency *policy*-influence ("voice," speech and voting power), among other things. Risks include *ex ante threats* to such access, such as risks to health, to a habitable environment, to remunerable productive capacity, to income, to legitimately held property,[52] and the like.

Agents of global justice, then, particularly the IFIs, should adopt as a general background principle the foundational desideratum that programs and policies pursued by governments, NGOs, and the IFIs themselves serve generally to equalize (ideally, by "leveling-up"[53]) the exogenous opportunities and (ideally, by "leveling-down") the risks faced by the world's inhabitants, while honoring the legitimately varying consequences of those peoples' varying responsible and varyingly valued deeds. The guiding ideal should be that all are entitled to equal opportunity to build and live a worthwhile and productive life, that all are entitled to equal opportunity to provide against threats to the successful building and living of such lives, and that all are entitled to seeing that all such differences as might be found between their farings can be traced

52. By "legitimately held" property I mean property the holding of which is justifiable by reference to the account of justice adumbrated above.

53. This is to minimize conflict, based in part on the theory that any one person would rather have "more" than "less" opportunity.

to differential purposive choice and action. This ideal, like our model of justice itself, suggests that *markets*, appropriately constituted and monitored with a view to the justice both of their procedures and of the ethically exogenous endowments with which people enter them, not only may, but probably must, play a critical role both in "justice-accounting" and in the just allocation of welfare-opportunity and -risk.[54]

B. *"Programs" and "Policies"*

The IFIs generally pursue or sponsor what we might term *programs* and *policies*, which two classes are distinguishable by reference to the structure of the IFI/client state relation and to the structures of the IFIs' mandates.[55] We can also *sub*classify the categories of program and policy themselves, but I shall elaborate upon this prospect no more than is necessary for this Essay's present purposes.

By a "state program," I mean a specific measure or set of measures, generally taken by a state client of one of the IFIs, which the pertinent IFI either approves, disapproves, or takes a neutral stance toward, and which the IFI might sometimes actually sponsor, facilitate, or act as to impede. By an "IFI policy," I mean a determination by one or more of the IFIs to approve, disapprove, sponsor, or facilitate, or to act as to impede, certain *classes* or *types* of state pro-

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54. The necessity, as distinguished from the mere sufferability, of markets stems from the following: (a) trade's role in converting initially identical allocations to more ethically intelligible "envy-free" allocations (more ethically intelligible because different persons will tend to derive, through no fault of their own, differing "subjective" utilities from identical "baskets" of "objective" goods), as explored in some of the literature cited at note 28, *supra*; (b) the envy idea's optimal mediation between the proper distribuendum's necessarily objective and subjective aspects (*see* Robert Hockett & Matthias Risse, *Primary Goods Revisited: the "Political Problem" and its Rawlsian Solution* (2004) (under review); Hockett, *Grammar*, *supra* note 19); (c) the role that both trade and "trading-off" play in establishing *de facto* comparative rates of valuation—and commensuration—among otherwise seemingly incommensurable goods (*see id.*); and (d) the need for such "price ratios" as emerge from such *de facto* commensuration in order to derive an appropriate measure of the costs that each person's demand upon resources effectively imposes upon everyone else, which measure in turn is needed in order to determine what each person's appropriate share of the exogenous endowment is. *See* CHARLES LINDBLOM, THE MARKET: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT 125, 135–36 (2002); DWORKIN, SOVEREIGN VIRTUE, *supra* note 17, at 70; Hockett, *Grammar*, *supra* note 19.

55. These two structures are perhaps best viewed as two aspects of but one structure, as the federal/state relation and the structure of the federated polity are two sides of the Tenth Amendment of the U.S. Constitution. *See generally* New York v. United States, 505 U.S. 144 (1992) (holding that by requiring states to "take title" of low-level radioactive waste produced within that state, Congress exceeded its constitutional authority relative to the states).

gram undertaken by client states. By an "IFI program," I mean one particular kind of method—a "carrot-offering" method—by which an IFI might *pursue* an IFI policy.

The IFI program/policy distinction is rooted in the structures of the IFIs' mandates. Both the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF), by way of two conspicuous examples, are authorized affirmatively to facilitate certain state programs that are considered consistent with those organizations' missions as embodied in their mandates. Probably the most familiar instance in the case of the IBRD is that of the project development loan, a direct loan and/or mobilization of lending and other contributory activity by other parties to finance and sometimes execute a specific development project, such as a road or a dam.[56] A familiar example in the case of the IMF is the Extended Fund Facility, which permits an IMF member country to borrow over a three- to four-year period to address some "structural maladjustment[ ] in production and trade" thought responsible for a persistent and "serious payments imbalance."[57]

Both the project loan and the Extended Fund Facility, respectively, constitute IBRD and IMF programs. But the IBRD and IMF do not limit themselves to "carrots" in the form of direct or indirect assistance. They also employ "sticks" of varying heft, most heavily in the form of so-called conditionality—the conditioning of various forms of assistance upon the satisfaction of certain stipulated criteria[58]—and less heavily, in the case of the IMF, in the forms of "surveillance" and "consultation."[59] One way to think of IFI policies, both in relation to and as distinct from programs, is to characterize the former as clusters of such norms as determine (a) what conditions the IFIs impose upon the provision of requested assistance (that is, upon their programs); (b) what they look for in

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56. *See* Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, art. III, § 1(a), 60 Stat. 1440, 2 U.N.T.S. 134 (amended Dec. 16, 1965) [hereinafter IBRD Articles of Agreement].

57. *See* TREASURER'S DEPARTMENT, INTERNATIONAL MONETARY FUND, FINANCIAL ORGANIZATION AND OPERATIONS OF THE IMF 42 (Int'l Monetary Fund Pamphlet Series No. 45, 6th ed. 2001).

58. *See* IBRD Articles of Agreement, *supra* note 56, art. III, § 4 ("Conditions on which the Bank may Guarantee or Make Loans"); Articles of Agreement of the International Monetary Fund, July 22, 1945, art. V, § 3, 60 Stat. 1401, 2 U.N.T.S. 39 [hereinafter IMF Articles of Agreement] (entered into force Dec. 27, 1945) ("Conditions governing use of the Fund's general resources").

59. *See* IMF Articles of Agreement, *supra* note 58, art. IV, § 3 ("Surveillance over exchange arrangements").

their surveillance activities; and (c) what they recommend in their consultative capacities. Of course this way of characterizing policy is not altogether *pragmatically* airtight in distinguishing policies from programs, because the latter, presumably, also are dictated or constrained in considerable measure by the former. But the *analytic* or *conceptual* distinction seems maintainable and comprehensible enough, and proves useful in what follows. Accordingly, with the justice-theoretic distinction between justice-salient benefit (opportunity) and justice-salient burden (risk), and the (pragmatically rough and ready) IFI mandate-grounded distinction between policy and program firmly established, we can now derive *four broad classes of action* that the IFIs can take in furtherance of what I have called "financial justice."

C. *Program and Policy Types Geared Toward Justly Allocating Opportunity and Risk*

The two axes sketched above[60] suggest four basic quadrants. I consider them in turn.

1. Opportunity-Spreading Programs

The IFIs should consider, and to a significant degree already are engaged in, the active encouragement and even outright sponsorship of state programs that tend to equalize global citizens' opportunities to engage in value-productive activity. Conspicuous examples thus far attracting little controversy include the facilitation of literacy and broader education programs as well as, thus far somewhat more tentatively, of micro-credit programs.[61]

A more controversial, though no less justified, example is the facilitation of land reform—the breaking-up of large landed estates, descended directly from naked violence and outright seizure, the current holdings of which simply cannot be defended in justice and tend both (a) to exclude huge swathes of the predominantly rural populations of many countries from access to the principal and most salient productive resource likely to be

60. *See supra* Parts IV.A–B.

61. See, for example, any of the numerous policy papers and letters of intent brought up in searching the websites of the IBRD, http://www.ibrd.org, and the IMF, http://www.imf.org, for documents bearing the words or phrases "education," "literacy," and "micro-credit."

found in those countries for some time to come, and (b) actually to *inhibit* even *aggregated* economic *growth.*[62]

A more middle-of-the-road example would be the facilitation, through some analogue to the familiar U.S. phenomenon of government-facilitated mortgage-insurance, of the acquisition by currently capitally disenfranchised global citizens of new lands or new issues of corporate stock—in the latter case a corporate-capital analogue to the American Northwest Ordinance, Louisiana Purchase, and especially the "Homestead" Acts, which broadened access to productive assets, and indeed agricultural productivity, without directly confiscating assets already held.[63] Another middling example is simply to facilitate and encourage, the education of local populations in the ways of democratic decision-making constrained by respect for fundamental rights. For such decision-making modes, as well as the fundamental rights-based "bracketing" of some interests as protected from possible "majority tyranny," are themselves both entailments of the equal dignity principle, and

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62. *See, e.g., The Making of the East Asia Miracle,* WORLD BANK POL'Y RES. BULL., Aug.–Oct. 1993 ("high growth with equity"); Ha-Joon Chang, *The East Asia Development Experience, in* RETHINKING DEVELOPMENT ECONOMICS 107–24 (Ha-Joon Chang ed., 2003); Gabriel Palma, *Latin America During the Second Half of the Twentieth Century: From the "Age of Extremes" to the Age of "End-of-History" Uniformity, in* RETHINKING DEVELOPMENT ECONOMICS 125–51 (Ha-Joon Chang ed., 2003); OFFICE OF THE CHIEF ECONOMIST, INTER-AMERICAN DEVELOPMENT BANK, LATIN AMERICA AFTER A DECADE OF REFORMS: ECONOMIC AND SOCIAL PROGRESS 1997 REPORT (1997); Carlos Salinas de Gortari & Roberto Mangabeira Unger, *The Market Turn Without Neoliberalism,* 42 CHALLENGE 14 (1999) (prosposing an alternative to neoliberalism to mobilize national resources in developing countries); Alwyn Young, *The Tyranny of Numbers: Confronting the Statistical Realities of the East Asian Growth Experience,* 110 Q.J. ECON. 641 (1995) (discussing output growth, factor accumulation, and productivity growth in Hong Kong, Singapore, South Korea, and Taiwan).

There is considerable irony here, since it is precisely those who tend to oppose land reform who tend most often also to fall prey to the fallacy of illicit welfare aggregation (under the name of "economic growth") discussed above.

63. *See* Robert Hockett, *A Jeffersonian Republic By Hamiltonian Means: Asset-Diffusion Policies, Legal-cum-Financial Engineering, and the American Political Tradition* (forthcoming 2005) (on file with author); *see also* WORLD BANK, CURING WORLD POVERTY: THE NEW ROLE OF PROPERTY (1994) (arguing that the solution to world poverty lies in programs that equalize access to the means by which people become owners of capital, thereby broadening the allocation of private ownership of property in closer conformity to principles of distributive justice). There was nonetheless much confiscation in the case of America's comparatively egalitarian—at least as regards citizens—land policies of the later eighteenth and the nineteenth centuries: Confiscation from the continent's indigenous inhabitants, confiscation of the labor of many whose work rendered the land productive—at least south of the Mason-Dixon Line—and, of course, from Mexico. And I have to add that, even apart from confiscation from non-citizens, the examples here raised are indeed "middling," since they tend of course to dilute to some extent the values of those assets held *ex ante* by the small, exclusive classes of the well-to-do. But the point is that, if the beneficiaries are appropriately targeted, dilution of the already well-fortune-favored will be warranted in justice.

instruments in the collective project of broadening material opportunity to all.[64]

2. Risk-Spreading Programs

The IFIs should consider, and to some degree already are engaged in, the active encouragement and even the facilitation of state and interstate programs designed to afford all persons greater opportunity to lay-off or to mitigate the ravages of ethically exogenous risk. The IFIs already engage in such activity "to some degree" in two senses. First, to some extent the equalizing of opportunity[65] equalizes capacities to head-off or mitigate certain forms of risk as well. (The better-off you are, the better able you are to avert and mitigate catastrophe.) Second, the IFIs routinely pay lip-service, and sometimes pay more than that, to state provision of "social safety nets."[66] The IFIs, however, can do much more in this vein, and doing so will be quite readily appreciated as consistent with their mandates.

First, the IFIs can become more forthright in, and perhaps less embarrassed about, noting and calling attention to both the justice-requirement and the efficiency-promoting roles of traditional social insurance. The latter is ("social insurance" is the antecedent) justice-mandated for reasons that ought to be readily appreciated in light of the discussion in Part III.A of this Essay. And it is efficiency-promoting in ways that once were commonplace, but appear lately to have been forgotten to the public discourse. Social

64. Again, I must defer comprehensive tracing of the relations between political authority and other currencies of justice to separate works recently submitted or now in progress, many of which are cited *supra*. A very useful anthology of previously published articles on the international *law* of democracy is DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000). I am tempted to add an analogical consideration here that I have not encountered elsewhere: The "Guarantee Clause" of the U.S. Constitution charges the federal government with the responsibility of guaranteeing that the nation's political subdivisions, the states, retain a "republican form of government." *See* U.S. CONST. art. IV, § 4. A cognate norm appears to be in the process of crystallization within the *global* (customary) "constitution." *See, e.g.*, Reisman, *supra* note 8. For present purposes, there is no need to say more on this matter; but it certainly would appear to bolster the case made here.

65. *See supra* Part IV.C.1.

66. *See, e.g.*, LOUISE FOX, SAFETY NETS IN TRANSITION ECONOMIES: A PRIMER (World Bank Group, Social Protection Discussion Paper Series No. 0306, 2003); KALANIDHI SUBBARAO, SYSTEMIC SHOCKS AND SOCIAL PROTECTION: ROLE AND EFFECTIVENESS OF PUBLIC WORKS PROGRAMS (World Bank Group, Social Protection Discussion Paper Series No. 0302, 2003); W. JAMES SMITH & KALANIDHI SUBBARAO, WHAT ROLE FOR SAFETY NET TRANSFERS IN VERY LOW INCOME COUNTRIES? (World Bank Group, Social Protection Discussion Paper Series No. 0301, 2003). See also numerous documents brought up by a search of the IMF website, http://www.imf.org, for documents containing the phrase "social safety nets."

insurance tends to lessen peoples' resistance to economic change and dislocations that can, through the familiar beneficial effects of factor-mobility—resources' (including "human resources"') flowing to their "most-valued uses"—result in a larger economic "pie" from which all may be nourished.[67]

Second, and more important, the IFIs can facilitate the development and adoption of altogether *new means* of distributively just and efficient, "market-friendly" (and indeed market-*employing*) global risk-sharing. Here I have in mind, in particular, new markets in new, macroeconomic-index-correlated hedging instruments, instruments that will enable persons, and in some cases entire countries or regions, individually and collectively to lay-off risks that traditional insurance markets, owing to their structural incapacities, up to now, to meet the market-requirements adumbrated throughout Part III.B, currently do not permit them to trade.[68] Insofar as such instruments facilitate desired risk-trading that currently is unavailable due to familiar insurance market failures, they will be efficiency-promoting.[69] And insofar as markets in such instruments *operate* efficiently, such that information bearing upon the values of the underlying aggregates to which the new instruments' payouts are tied is impounded in their *prices*, they will be *justice*-promoting. For their prices will forewarn those who might otherwise have assumed net-worth-affecting risks (selections of certain occupations, for example, or of certain places in which

67. Of course, once again, the better we do with widely distributing opportunity, the less necessary it will be to do this. I note it only to show that even aggregationists ought to approve, by their own distorted lights.

68. Briefly, the idea here is to make use of new data-gathering and -collating technologies to amass macroeconomic data, from which we can construct periodically adjusted indices of macroeconomic performance to which persons' net worths are significantly tied. The purchase and sale of derivative hedging instruments whose values were contractually tied to the indices would effectively enable people to insure significant portions of their net worths, for people unable to affect the values of those aggregates are people who pose no moral hazard. Some examples of such contracts that I have sketched elsewhere include what I call a "small practice lawyers' income collar," a "small town domestic product collar," and a "small town real estate value collar." *See generally* Hockett, *Macro-Hedging*, *supra* headnote; ROBERT J. SHILLER, THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY (2003) (proposing a radical democratization of risk management infrastructure to insure against a broader scope of financial hazards). Many new such contracts can be envisaged and designed. And they need not be only between individual persons; entire countries, particularly those whose GDP performances tend to counter-vary, might engage in "GDP swaps," for example, effectively insuring each others' populations against the effects of business cycle volatility (provided, of course, that incoming payments were *distributed* fairly over their populations).

69. In the familiar Paretian sense, for familiar Arrovian reasons. *See, e.g.*, MAS-COLELL ET AL., *supra* note 37, at 307–43, 545–74; VARIAN, *supra* note 37, at 215–29, 314–35, 404–12; KREPS, *supra* note 37, at 149–81.

to reside) unknowingly, and thus effectively will both (a) ethically endogenize many previously ethically exogenous risks, and (b) assist in the earlier noted, ethically critical task of "justice-accounting."[70]

Of course, in facilitating any such new programs, the IFIs should exercise a preferential option in favor of those who *currently*, provided that it be through no fault of their own, enjoy the *least* opportunities to head-off or to mitigate ethically exogenous risk. Such is one entailment of the mandate that we equalize by "leveling up."

3. Opportunity-Spreading Policies

The IFIs should consider not only directly facilitating or subsidizing opportunity-equalizing programs but also encouraging them via their *surveillance* and *consultative*, and their *condition*-imposing, functions. The IFIs, in other words, should not only directly assist states in equalizing opportunities over their constituent citizens, but should actively recommend, if not indeed insist, that states themselves act to do so. For, as argued earlier, the states, and more to the present point the IFIs themselves, *exist for persons*, not for the states or for the IFIs themselves. They are *agents* of the global citizenry, who are, in justice, to be taken for and treated as the moral equals that they are, equally entitled to and subject to all opportunities and risks that are ethically exogenous—that is, all opportunities and risks, and increments thereof, for the existence of which they cannot reasonably be held responsible—and equally charged with the responsibility to live with such benefits and burdens, and increments thereof, for the existence of which they *are* accountable in justice. The IFIs exist to assist those persons in pursuing development and prosperity, which latter concepts are, as argued in Part II, intelligible as values only insofar as they are understood in non-illicitly-aggregative, distributive-justicial senses.

Accordingly, the IFIs should actively look to the degrees to which their clients are working to equalize political, economic and environmental opportunities over the citizens of whom they are agents;[71] should exhort them, pursuant to their properly interpreted mandates, to do better jobs of so equalizing when they are doing poorly; and should even condition sundry forms of assis-

70. *See* Hockett, *Macro-Hedging*, *supra* headnote.

71. That is, they should examine and evaluate packages of national policies with those ends in view.

tance offered them upon their doing well in this respect.[72] Considerations of prudence—the directing of scarce resources to where their "payoff" is likely to be largest once the costs of possible political "backlash" are subtracted—admittedly might tend to counsel that the IFIs push along these lines when and where they appear most likely to succeed. And we shall get to strategies by which they might effect such prudence shortly. Nonetheless, prudence, very simply, must not be permitted, as it so often seems to be, to serve as a mask for mere complacency. Justice is not an afterthought; it is not "dessert." It is all of our desert, our ever-present, fundamental duty to and entitlement of each other.

4. Risk-Spreading Policies

The same observations made in connection with *opportunity*-equalizing policies apply to *risk*-equalizing policies. There is little need to tarry over what minor differences might exist between the interests of the IFIs' adopting and fostering opportunity-equalizing policies on the one hand and risk-equalizing policies on the other. Perhaps it will be well, then, to turn directly and briefly to the matter of justificatory strategy.

D. *On Justification*

The conception of "financial justice" set forth at Part III, and the "diagnosis" of the IFIs' current ills offered before that at Part II, both suggest a three-tiered strategy that these institutions and their defenders should adopt in addressing the carpings of their critics—apart, that is, from actually *embracing* the program- and policy-types discussed immediately above.

First, the IFIs and their defenders should reply, to those who accuse them of trampling upon "national sovereignty," or who accuse them of favoring certain (exogenously) disadvantaged persons or groups within societies, precisely *that* their concern is with global justice—with dignitary equality among the world's citizens—and that no criticism of their actions is intelligible as a criticism unless it too speaks to the justice of those actions. Favoring the interests of those who thus far have been disfavored by fortune (rather than by their own choices or deeds) cannot be seriously claimed as unjust; *not* so favoring them *can*. And no party who purports to speak for a nation yet does not treat that nation's princi-

72. Assistance has, quite literally, no other intelligible point. There is no more reason to *assist* in the pursuit of a fetish than there is to *engage* in it.

pals, its citizens, as moral equals can be seriously taken for legitimate, or "sovereign." To hold otherwise is to commit, in one form or another, the fallacy of illicit political aggregation. I suspect that persistence in tying their policies directly and transparently to a plausible conception of justice, and in challenging objectors to warrant their objections by similar reference, will in the long run shame all into doing so and thus elevate the ethical status both of global debate and of globalization.

Second, the IFIs and their defenders should reply, to those who accuse them of overstepping their mandates, that, first, their mandates include not only their constitutive enabling documents, their articles of agreement, but also, and indeed superordinately, the broad treaty- and custom-grounded "global constitution" of basic human (including environmental, economic, social and political) rights,[73] and that the most plausible readings of these broadly and grandly writ or understood documents and prescriptive norms give expression to something very like the conception of global justice among morally equal persons adumbrated above; and second, their *enabling documents themselves* are best read in light of that conception of justice, for those documents explicitly embrace prosperity and development as actuating aims,[74] while these latter in turn, as argued above in Part II.B, are *intelligible* as plausible objects of rational pursuit only when understood against the backdrop of that conception. To hold otherwise is to commit the fallacy of illicit welfare aggregation.

Third and finally, the IFIs and their defenders should reply, to those who accuse them of indifference to social justice, to the environment, and to democratic values (including transparency, a necessary incident of the exercise of informed political choice), "You're *right*, in part!" For those critics are indeed correct, insofar

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73. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 3 (entered into force Jan. 3, 1976); Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293 (entered into force Sept. 22, 1988); Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* Mar. 16, 1998, U.N. Doc. FCCC/CP/1997/7/Add.1, Annex, art. 12 (scheduled to enter into force on Feb. 15, 2005).

74. *See, e.g.*, IBRD Articles of Agreement, *supra* note 56, art. I, §§ (i)–(iii) ("The purposes of the Bank are . . . assist[ing] . . . development of territories of members, . . . [promoting] growth, . . . raising productivity, [and] the standard of living[.]"); IMF Articles of Agreement, *supra* note 58, art. I, §§ (ii), (v) ("The purposes of the International Monetary Fund are . . . promot[ing] . . . development [and] . . . prosperity.").

as the IFIs have thus far failed to pursue agendas consonant with justice roughly as described above. And the IFIs *should* endeavor to do better, by proceeding roughly along the lines suggested here. There will always be, of course, some room to quibble over details and particulars, but the general direction both can and should be clear.

V. Conclusion: Three Pillars of Just Globalization—Doing Well by Doing Good, Doing Good by Doing Right, and Making Friends of Those Whose Friendship Is Worth Cultivating

This Essay has proved to be a somewhat ambitious—perhaps an overreaching—undertaking. Yet it also can be thought conservative. I advocate that the IFIs and their defenders forthrightly repudiate two long-standing (but increasingly now questioned) doctrinal traditions and orientations in the disciplines of international law and economics: that they embrace a justice-centered, hence a person-centered, understanding of global law, development, and their own mandates; and that they boldly proclaim, to their critics both putatively "sovereign" and "merely" civil-social alike, that they—and all of us—are "*agents* of justice," acting on behalf of and in debt to one another as exogenously equally owed and equally owing moral persons. I have also advocated that these institutions and their defenders consider embracing a "financial" *conception* of justice, and that they take decisions in respect of policies and programs both of their own and of their client states with a *view* to that conception. Is this not beyond the present pale?

I do not think so. No one doubts that no one is quite satisfied with the course that "globalization" is taking, or with the role that the IFIs and other agents of transnational economic integration thus far have played in steering that course. And no one who reads the newspapers or accesses the supplemental news media can doubt that globalization and its agents, the IFIs conspicuous among them, have few enthusiastic friends these days. Yet the agents of globalization, including the IFIs, have by and large been *playing by their scripts*—by, that is to say, their traditionally construed scripts. The monstrous set of fears, crises, recriminations, dysfunctions, and displacements that all jointly constitute present-day globalization stem *directly* from the prescriptions both of traditional Keynesian and of neoclassical economics, and from the constraints

imposed by traditional international law.[75] They stem directly from the fallacies of illicit aggregation, from *de facto* and indeed *de dicto* indifference to justice among moral equals. And there simply is no way to "humanize" globalization without humanizing—without "justicializing"—the disciplines of economics and international law which underwrite and guaranty it, at least insofar as they underwrite and guaranty much of the current practice of the IFIs. We must embrace head-on the task of grounding both of those disciplines, and the policies and programs both prescribed and justified by them, and, more pragmatically, the missions of the IFIs which largely act upon them, in a plausible conception of global justice among persons.

Yet while this claim, and the recommendations that this Essay offers in its light, are perhaps quite "radical" in the sense of that word's Latin root, connoting "rootedness" or fundamentality, they are also, again quite literally, critically *conservative.* They are conservative in at least two senses. First, they are aimed at the conservation, quite literally, of much that is worth holding onto and is now under considerable strain, namely, cooperative and collective action, both within and between states, directed toward the enhancement of human freedom from material drudgery and want. These increasingly will come, and will remain, under threat; and possibly will *perish* absent a subtle reminder of what we are about in pursuing this grand project. Second, my claim and my recommendations are conservative in that they effectively amount to an altogether plausible reading of the very constitutive documents, mandates, customs, and practices that we have been claiming to *authorize* our activities all along—documents and practices whose words and whose details we need not torture in the least to understand them as I have advocated here.

Why not simply *admit,* then, that we have allowed ourselves in recent decades not simply to put the cart before the horse, but to pretend that the cart could propel itself *without* the horse, in pursuing "development" and honoring "nations" without adequately considering the individuals in whose service, after all, development intelligible *as* development is pursued and nation-states intelligible as anything other than organized crimes are constituted in the first place? And why not now *hitch-up* that horse, and put ourselves, individual human beings who both owe and are owed by one another, in the driver's seat? Is it because we fear the angry mut-

75. *See supra* Part II and accompanying discussion.

terings or screeds of those who thus far have exclusively enjoyed the *fruits* of consequent injustice? Their enmity, I suspect and I submit (which also is their own *self*-enmity), is the very *least* among our worries.

Let me close, then, with a hopeful picture. Imagine three institutions. One ensures that goods and services flow freely across boundaries. It ensures, that is, that no agency can, in the purported name of individuals, discriminate among—treat as unequal—suppliers of valued items on the basis of anything but those items' values to individuals themselves, not the national identities of their sellers, while nonetheless recognizing and giving expression to the rights of people collectively to prevent fraud or otherwise concealed and disvalued harm in the trading.

A second institution ensures a similar equality of treatment for national currencies and global suppliers and consumers of investment capital—the "surplus" held back and employed in the development and improvement of goods- and service-productive capacity—while again both permitting and indeed encouraging (while actively assisting in) the prevention of fraud and cognate unbargained-for risks in transacting.

Finally a third institution works to move us closer to equality of treatment for all would-be *participants* in this great global enterprise of supplying and remunerating one another, both *prior to* and *throughout* their actual participation. It does so by working to ensure that both the exogenous resource endowment and the ethically exogenous portion of the aforementioned "surplus" that is out there from which to produce and to develop productive capacity is available on as equal terms as possible to all, and that all as it were "negative" such surplus—all exogenous risk (to health, to environment, to productive capacity, etc.)—*also* is more or less equally *shouldered* by all.

Three realms of global market equality, three global institutions to underwrite it, all operating against the backdrop of a crystallizing global constitution that enshrines, in various ways, that principle of equal dignity, of equal right and obligation, among the world's inhabitants that I have sketched. Now ask yourself, is there really that much space between this picture and what I have advocated in the foregoing paragraphs? And is there, when we take a few steps back to gaze upon their scaffoldings, that much space between my picture and the institutional structure of the world we inhabit? I suggest that the space is very small, and that we ought now to do all we can to close it.